88-649

Supreme Court, U.S.
FILED
AUG 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JACK E. CRAVENS,

PETITIONER,

v.

STATE OF WASHINGTON,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FORD, NEES & NORDSTROM, P.S.

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Date: September, 1988

A. QUESTION PRESENTED FOR REVIEW

By ordering a mistrial and denying defendant's motion to dismiss, did the Court deprive the defendant of his constitutional right against twice being placed in jeopardy, where, in direct contradiction with all existing federal and state decisions, the Court held that the mere mention of the word polygraph constituted prejudicial error.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Jack E. Cravens respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on April 12, 1988.

B. OPINION BELOW

The opinion of the United States Court of Appeals for Ninth District (Appendix A) was not reported. The opinion of Federal District Court below (Appendix B) was not reported.

C. JURISDICTION

The judgment of the Court below, (App. A) was entered April 12, 1988, rehearing was not sought. The jurisdiction of the Supreme Court is established pursuant to the Constitution of the United States under the due process clauses of the Fifth and Fourteenth Amendment.

D. CONSTITUTIONAL PROVISIONS

1. The Fifth Amendment, United States Constitution provides:

ARTICLE [V.]
No person shall be held to

answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war of public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment, United States Constitution Section 1, which provides:

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

E. STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE CASE NOW BEFORE THIS COURT

On July 2, 1985, the Trial Court in this matter granted the prosecution's Motion for Mistrial over defendant's objection. That Order was formally entered July 19, 1985.

Following exhaustion of State remedies, a Writ of Habeas Corpus was filed in Federal District Court, Eastern District of Washington, on March 31, 1986. A hearing followed on April 4, 1986 and continued on April 18, 1986. An Order denying the defendant's Petition for Writ of Habeas Corpus was issued on May 29, 1986. Defendant then moved for reconsideration on June 9, 1986, which was denied on June 12, 1986.

On June 17, 1986, Notice of Appeal was filed with the Ninth Circuit Court of

Appeals, and on June 24, an Order was entered granting "petitioner's request for Certificate of Probable Cause."

On April 12, 1988, a judgment was filed and entered in the United States Court of Appeals for the Ninth Circuit, affirming the District Court's judgment that a Writ of Habeus Corpus be denied.

II. RELEVANT FACTS CONCERNING THE MISTRIAL

Appellant Jack E. Cravens was arrested and charged with second degree theft of $552.00 building material from Ziegler Lumber Company. (App. C, P. 8, L. 12) The allegations stemmed from an alleged confession by Charles Astor that he had worked with Mr. Cravens in appropriating building materials from Ziegler's without paying for them. (App. C, P. 26)

Mr. Vern Ziegler was called as the State's first witness during which time

he testified to a decrease in gross profits (App. C, PP. 19-21) which led to his subsequent investigation of the invoices of Ziegler Lumber Company in the first part of 1985 (App. C, P. 21, L. 13), and suspicions that the defendant, and employee Charles Astor were involved. (App. C, PP. 25-26) Defense counsel objected to this line of questioning as being irrelevant to the charge ($552.00 theft), but the Court overruled this objection. (App. C, P. 20) However, during cross examination, Mr. Ziegler admitted that he didn't actually know if there were any theft losses (App. C, P. 54), but that he did suspect there were a few employees involved in stealing. (App. C, PP. 54-55) Additional questions were asked regarding another possible thief but the State objected to this line of questioning and the Court sustained the objection. (App. C, P. 58) Defense

counsel indicated he would like to make an offer of proof and the Court directed counsel to approach the bench. (App. C, P. 59) During that conference the Court told counsel.

> I think that you can sufficiently argue Mr. Ziegler's strong feelings about identifying the thieves from the testimony that you are now eliciting without going into why he may have accused someone else... (App. C, P. 60, L. 21)

The trial continued with defense counsel inquiring of the witness:

> Mr. Ziegler, in an effort to identify stealing by your employees at Ziegler Lumber, did you have your employees take polygraphs? (App. C, P. 61, L. 5)

The State immediately objected to this question and the Court sustained the objection after which the parties approached the bench. (App. C, P. 61, L. 9) Out of the hearing of the jury, the prosecution's first statement was, "I think I am forced at this time to ask for

a mistrial". (App. C, P. 61, L. 15) During the argument that followed the state recited its belief that, "...the fact of a polygraph, or anything even tangently related to polygraphs (can not come before the jury." (App. C, P. 61, L. 15) However, the State had previously admitted it had not researched the issue. (App. C, P. 61, L. 21)

During this time frame the Court made its only reference to the jury, stating: "The jury would wonder why aren't the results brought out." (App C, P. 63, L. 21) The judge then stated, "I am disposed to grant the mistrial". (App. C, P. 63, L. 23)

Defense counsel had previously indicated he had not briefed the issue, (App. C, P. 62, L. 2) and asked for a brief recess to review the law, but the Court did not repond to the request. (App. C, P. 64, L. 1) Following a short

discussion, the State asked that the question be reread, stating:

> If your question was: Did you require employees to take polygraphs, I believe Mr. Ziegler can testify "no", and if we drop it at that, we may be able to salvage it. If the question was: Did you administer polygraphs, the Mr. Ziegler is going to have to answer "yes," and we can explain it away as a fishing expedition by counsel as to the issue of polygraphs, depending upon how it came out... (App. C, P. 65, L. 15)

Following the rereading, the State reiterated it was asking for a mistrial. (App. C, P. 66, L. 22) The State's rationale for this position was:

> I don't believe that the issue of polygraphs -- the running of a polygraph -- can be admitted into evidence in this case. I believe that just the fact of the questions, irrespective of the answer, has prejudiced the jury so badly that they are going to be wondering what the results of this polygraph are, and the State's position is that we can't get into it;... (App. C, P. 66, L. 23)

Defense counsel stressed that it did

not want a mistrial and suggested, as an alternative, that perhaps some follow-up questions highlighting the fact that polygraphs were inadmissible could resolve the problem. Counsel indicated he hadn't given a lot of thought to how to salvage the matter at that point but thought it may be a solution. (App. C, P. 68, L. 13) Defense co-counsel then stated that since the question wasn't answered, "I don't see why this can't be solved by just having the jury admonished to disregard that last question." (App. C, P. 68, L. 17) The Court did not respond to either request except to say:

> ...you would no doubt understand how easily you would be upset at the prosecutor asking such a question and saying in argument that once the bell has been rung, that's it. ...and the bell has been rung here. (App. C, PP. 68-69)

The Court then made an interesting observation, indicating that had the word

"investigation" been substituted for the word "polygraph" that the question submitted to Mr. Ziegler would have been appropriate:

> There could have been a question submitted to Mr. Ziegler: Did you undertake an investigation, and as a result of that investigation, did you believe that other people employed by you had stolen? You could have brought it out that way, without introducing this business of lie tests. Your pre-trial efforts to obtain the lie tests were obviously for the purpose -- and the court permitted it, for just one purpose -- and that is to determine whether or not there may have been some collaboration on the part of employees to steal and that sort of thing that might be exculpatory to Mr. Cravens;... (App. C, P. 69, L. 4-23)

The Court concluded its observation by again berating defense counsel for his unjustified question. (App. C, P 69; see also P. 63, L. 12, 18-19, 24; P. 64, L. 22; P. 69, L. 2) The Court then stated, "The court will declare a mistrial." (App. C, P. 69, L. 23) The jury was then

recalled and excused. (App. C, P. 71, L. 14)

The trial transcript reveals that the morning session of trial commenced at 9:30 a.m. (App. C, P. 49) Twelve pages of transcript follow prior to the point where defense counsel asked the fateful "polygraph" question. (App. C, P. 61) An additional eight pages follow until the mistrial is declared. (App. C, P. 69) The total elapsed time from the commencement of the morning session until the declaration of the mistrial was less than 60 minutes. (App. C, P.71) Since twelve of the twenty pages of transcript preceded defense counsel's question, and only eight pages of transcript until the actual declaration of mistrial, the Court's total consideration of the mistrial issue arguably took less than twenty minutes.

Following the noon recess, defense

counsel, citing substantial case law regarding a judge's responsibility prior to granting a mistrial, made a motion to dismiss the case with prejudice on the basis of double jeopardy. (App. C, PP. 72-76) The State indicated it could respond, however, it preferred time to research the issue. (App. C, P 76, L. 7) The Court stated, "I think in fairness to the State, that (the State) should be entitled to have an opportunity to respond." (App. C, P. 76, L. 24) The Court then recessed. (App. C, P. 77. L. 22)

The following morning (the jury having already been released), counsel for the defense and the State argued the issue before the Court. The Court then responded by denying the motion to dismiss. (App. C, P. 108, L. 20)

The Court's primary rationale for granting the mistrial appears to be that

by asking the polygraph question, defense counsel had alerted the jury to the fact employees had been stealing from Zieglers:

> In looking at the situation which had developed during the trial here, up to the point of the propounding of this question to witness Ziegler, the background shows that during opening statement for the defendant, counsel remarked that the jury would find that there was a thief here -- thieves, really, not Mr. Cravens, but Mr. Astor, apparently, and Mr. Hunter, employees who would be shown to the jury who had been stealing from Ziegler Lumber. So the defendant has alerted the jury to this other issue, right from the outset, as to whether or not this defendant is the one at fault and criminally responsible, or those others in the employ of Ziegler Lumber Supply. (App. C, P. 101, L. 21)

This reasoning is obviously faulty since it was the State, and not the defendant, who apprised the jury of this "other issue". During opening statement, the prosecutor stated: "It is our posi-

tion that there was a conspiracy between the person who was working for Ziegler -- and you will find out that his name is David Hunter -- and Mr. Cravens..." (App. C, P. 5, L. 10)

The Court then addressed the suggestion proposed by defense counsel prior to the granting of the mistrial that the jury be instructed to disregard the question:

> The decision of this court in determining that the error was such that the State could not have a fair trial was prompted not only by the circumstances which I have earlier alluded to, but the fact that any alternative which was suggested here, the sole one being that the jury be instructed to disregard the question, wouldn't have cured the situation, ...The jury wouldn't have disregarded that, and we know it. It would wonder "what are we not being told here, aren't we entitled to find out what the results of these tests are?" And, of course, they can't. And the prosecutor can't get it in. And it's the defendant who brought it up. It's the defendant who pro-

> pounded the question. And now the defense wants to have the case dismissed because of this sort of activity. (App. C, P. 105, L. 20)

Finally, in support of its determination, the Court stated:

> (defense counsel's improper question) presented a situation where the State was obliged to object to a very critical question in the minds of the jury. And to try and apparently as far as the jury was concerned, keep out any reference to polygraph results. And the jury was, therefore, left to speculate what happened here. (App. C, P. 108, L. 7-12)

The Court had determined that the foregoing facts supported a finding of "manifest necessity", justifying the mistrial (App. C, P. 108)

F. EXISTENCE OF JURISDICTION BELOW

The Ninth District Court of Appeals has decided a Federal question in a way that conflicts with applicable decisions of the Court.

This is a double jeopardy issue. At the time of the Appeal to the Ninth Circuit, Federal Courts had relied on and referred to Arizona v. Washington, 434 U.S. 497, 98 S.Ct. 824, 54 L.Ed 2d 717 (1978).

The facts of Arizona, including the prejudicial statements made there by defense counsel as well as the trial judge's response, are concisely set forth at Page 514, Footnote 34:

> In this case, defense counsel made brief reference during voir dire to the fact that evidence was withheld from the defense at the previous trial. Later in the voir dire the prosecutor expressed his concern to the trial judge that if the jurors were aware of the fact that respondent obtained a new trial because the prosecution failed to produce some evidence, they might be prejudiced against the State. In response to the prosecutor's concern, the trial judge conducted an inquiry into whether the jurors knew the reason for the new trial. The inquiry revealed that the jurors were not then aware of the reason

for the new trial. During the opening statements which followed, however, defense counsel did not leave the matter to the jurors' conjecture; instead, he explicitly stated that they would hear testimony showing that the Supreme Court of Arizona granted respondent a new trial because the prosecutor deliberately withheld exculpatory evidence from the defense. Following completion of opening argument, the prosecutor moved for a mistrial.

During argument on the prosecutor's motion, defense counsel insisted that evidence of prosecutorial misconduct in a prior proceeding was admissible for impeachment purposes; although he could offer no authority to support this novel proposition, he indicated to the judge that he would appreciate an opportunity to "find ...some written law, which would allow this type of testimony...as evidence." Supra, at 500 n 3, 54 L.Ed.2d 725. While the trial judge remarked that he could conceive of no basis for the admission of such evidence and that he was tempted to grant the prosecutor's request immediately because of defense counsel's injection of the prosecutorial misconduct issue into the trial, supra. at 499-500 n 3, 54 L.Ed.2d 724-725, he did not act precipitately, rather, proceeding with caution and giving defense

> counsel the benefit of the doubt, App. 223, the trial judge reserved ruling on the admissibility question and at first denied the mistrial motion. In avoiding a hasty decision despite his conviction that the evidence was improper, the trial judge was plainly acting out of concern for the double jeopardy interests implicated by an improvident mistrial. (Id., at 2-25, 2-53)
>
> The following day the prosecutor renewed his motion. The trial judge heard extensive argument from both sides regarding both the propriety of defense counsel's opening statement and the need for a mistrial. Defense counsel contended that any prejudice which might have resulted from the references to prosecutorial misconduct could be cured by cautionary instructions; the prosecutor argued that such an alternative would be inadequate to remove the risk of taint.

In analyzing whether particular facts warrant a mistrial, the Court in Arizona v. Washington, discussed the defendant's "valued right' to have the trial concluded by a particular tribunal and that because of the importance of this right, stated:

> The prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant. Arizona v. Washington, 434 U.S. 497, 505, 98 S.Ct. 824, 54 L.Ed.2d 717.

Emphasizing the caution that should be exercised before granting a mistrial, the Court referred to Mr. Justice Storey's classic formulation:

> To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes... United States v. Perez, 9 Wheat., 579, 580 6 L.Ed. 165 (1824)

(Id. 506) In light of this strong language by the Court, it is interesting to note that after emphasizing how heavy the prosecutor's burden is and the great caution to be exercised by a judge before granting the prosecutor's request, that the Court never incorporates this "heavy

burden" into its analysis but structures its opinion in reference to "judicial deference". (Id. 509-516)

In formulating its opinion, the Court discussed various factual situations where a mistrial could be necessary and that, although there were different degrees of necessity, a "high degree" of necessity was required before concluding a mistrial was appropriate.

In the factual setting before Arizona v. Washington, this Court also stated, "the defendant's lawyer had made improper and highly prejudicial remarks ...". Because of the nature of those remarks and, "the trial judge's evaluation of the likelihood that impartiality of one or more jurors may have been affected...", (511) the Court concluded the trial judge's determination was entitled to "special respect". (Id. 510-511)

In light of that "special respect", the Arizona Court reviewed the trial judge's actions and found that by proceeding with caution, giving defense counsel time to research the issue and by initially denying the mistrial, he had not acted precipitately in response to the request for a mistrial. (Id. 514, N. 34; also 515) That he evinced concern for possible double jeopardy consequences giving both counsel full opportunity to explain their positions. Furthermore, the judge acted "responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding." (Id. 515-516)

The court was persuaded that the combination of these factors revealed an exercise of "sound discretion" on the part of the trial judge sufficient to support the "high degree" of necessity

required. (516)

Although it is often difficult to draw a comparison between cases, Brady v. Samaha, 667 F.2d 224 (1st Cir. 1981) provides the one constant that has existed in every case of this nature since U.S. v. Perez, 22 U.S. (9 Wheat.) 579, 6 L.Ed. 165 (1824):

> The one constant is that the actions of the trial judge in arriving at the decision to declare a mistrial must have been scrutinized in an effort to ensure that a "scrupulous exercise of judicial discretion" led to the decision. (229; citations omitted)

A review of the facts in the instant case reveals no such "scrupulous exercise of judicial discretion".

In contrast to the "responsible", "deliberate" and "careful consideration" exhibited by the Arizona trial judge through his non-precipitant response to the prosecutor's request for a mistrial and his obvious concern for double

jeopardy consequences, the trial judge in the present case failed to provide defense counsel with time to research the mistrial issue. (Appendix C, P. 64, L. 2) The State had already indicated it had not researched the issue. (App. C, P. 61, L. 21) The judge failed to address the alternatives posed by defense counsel when the record is clear that there was no affirmative statement of any possible jury bias. (App. C, P. 68, L. 4) The trial judge's only comment regarding this issue was, the jury would wonder why aren't the results brought out", (App. C, P. 63, L. 21) "...once the bell has been rung, that's it. ...and the bell has been rung here." (App. C, P. 68, L. 21) This failure to address possible alternatives emphasizes the lack of "the scrupulous exercise of judicial discretion," Brady, supra.:

Whether or not the record indi-

> cates he has considered alternatives to a mistrial is significant. (229, citations omitted)

See also U.S. v. Sanders, 591 F.2d 1293, 1299 (9th Cir. 1979) where the Court stated:

> The record must support the explicit or implicit finding of a "manifest necessity". This is especially true...when the record...reveals that the judge failed to adequately consider feasible alternatives to a mistrial...

In addition, the trial judge failed to provide full opportunity to defense counsel to explain his position, cutting him off in mid-sentence exclaiming, "and you interjected it, and that's the problem." (App. C, P. 63, L. 17) Brady, in citing numerous cases including Arizona addresses this factor as well. "Also of major importance is affording counsel an opportunity to be heard on the subject." (Brady, supra., at 229)

Furthermore, the trial judge's own

statement rather than revealing a "scrupulous exercise of judicial discretion", exemplified a judge who was "hot under the collar". (App. D, P. 28, L. 1). The trial judge stated:

> I feel the interjection of this subject of lie tests is very prejudicial, and I think there is no justification for it, even though everyone knows that it occurred. The law is very clear that no one can introduce results of lie tests. (App. C, P. 63); and you interjected it and that's the problem (Id. at 63); I think that this was a deliberate endeavor to inject something that is entirely inadmissible (Id. at 63); ...But this deliberate injection of the fact of polygraphs is what is so prejudicial, and we know that the law is that the fact of lie tests and the results of lie tests are just an anathema. (Id. at 64) ...Once a bell has been rung, that's it. (Id. at 68) It was rung deliberately by the injection in this question of the fact of lie tests. (Id. at 69); But this business of inquiring as to fact of lie tests is entirely unjustified. (Id. at 69)

Reference to defense counsel's "deliberate injection" of the question is mis-

leading since the Court was aware that this was defense counsel's first trial and that Mr. Schweda had been associated as counsel for that very reason. In addition, as noted below, there is absolutely no case law to support the Court's statement that the "subject of lie tests is...prejudicial".

Finally, unlike the Arizona Court, which found defense counsel's "hidden evidence" and the reference to the prosecutor's misconduct requiring the Supreme Court of Arizona to grant a new trial to be "highly prejudicial". Arizona v. Washington, 434 U.S. 497, 515, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978). In the present case, the trial judge acknowledged that had defense counsel posed the question as an "investigation" and had not included the word polygraph, that the question would have been acceptable:

There was no need for it.

> There could have been a question submitted to Mr. Ziegler: Did you undertake an investigation, did you believe that other people employed by you had stolen? You could have brought it out that way, without introducing this business of lie tests. (App. C, P. 69)

The obvious question suggested by this comment is, if the information illicited from that question would have been acceptable except for the mere mention of the word "polygraph", what possible prejudice could have followed? It is clear that this same question existed in the mind of Judge Quackenbush:

> The thing that concerns me in this case the question was asked, which didn't suggest any answer at all, the question was were polygraphs submitted to employees. The question was never responded to, and so I have a concern as to what possible prejudice or jury bias resulted just from that question. (App. D, P. 17, L. 10); But what possible bias or prejudice could be created against the State by that question. (Id. at 18); What possible prejudice or bias against the State was created by that

> asking of the question without any response? (Id. at 19); Why wouldn't just instructing the jury to disregard the question have cured the whole thing? (Id. at 21); I sensed that his ruling, the granting of the mistrial and I think the whole transcript even confirms that he was a little bit hot under the collar, because the question was asked, as you confirmed and you were there, that his biggest concern was the defense attorney, Mr. Janecek, even asked the question. But the question was or didn't lead anyone to conclude whether or not polygraphs were given. The question was, were they given...and I am having difficulty seeing how that prejudiced the State. (Id. at 27, 28); Well, I don't think the mere mention of the word "polygraph', and that's all there was in this case, is a basis for a mistrial. (Id. at 30)

There are numerous federal and state cases which specifically support the conclusion that defense counsel's mere reference to the polygraph is not prejudicial:

> The mere fact a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the

> result is raised. State v. Descoteaux, 94 Wn.2d 31, 614 P.2d 179 (1980) rev'd on other grounds, 97 Wn.2d 255, 643 P.2d 882 cert. denied (1982).

This statement is quoted in State v. Lavaris, 99 Wn.2d 851, 860, 664 P.2d 1234 (1983) which then indicates:

> It may be the better practice to eliminate any reference to any kind of polygraph, but that it cannot be determined error merely because it was introduced before the jury.

See also Sullivan v. State, 303 S.2d 632, (Fla. 1974) cert. denied 428 U.S. 911, 98 S.Ct. 3226, 49 L.Ed.2d 1220 reh'g denied, 429 U.S. 873, 97 S.Ct. 190, 50 L.Ed.2d 154, (1976); Hutchins v. State, 334 S.2d 112 (Fla.App. D3 1976) cert. denied 341 S.2d 291 (Fla. 1976); People v. Parisie, 5 Ill.App.3rd 1009, 287 N.E.2d 310 (1972); State v. Lamatty, 263 N.W.2d 559 (Iowa App. 1977); Lynn v. State, 231 Ga. 559, 203 S.E.2d 221 (1974); see also Wiese v. State, Fla.App. D4 357 S.2d 755,

where the Court found that reference to the polygraph not only failed to constitute prejudicial error but because the results of the polygraph test were not divulged there existed no error at all.

G. CONCLUSION

This writ is directed primarily at the issue of deference to be shown the trial judge. However, it is clear in numerous cases, including Arizona, supra, deference derives efficacy by an exercise of "sound discretion" on the part of the trial judge.

> [i]f the record reveals that the trial judge has failed to exercise the "sound discretion" entrusted to him, the reason for such deference by an appellate court disappears. Arizona v. Washington, 434 U.S. at 510 N28, 98 S.Ct. at 832 N.28; see also Brady v. Samaha, 667 F.2d 224 at 229 (1st Cir. 1981)

And when there is such an obvious absence

of factual support for declaring the mistrial, coupled with sound case law that mere reference to the polygraph is not prejudicial as is the case in the present matter, it would be unconscionable to find the Trial Court in the present matter acted with "sound discretion".

For the reasons set forth, appellant respectfully urges that the Order of the United States District Court for the Eastern District of Washington be reversed and a Writ of Habeas Corpus be issued prohibiting Jack E. Cravens from being retried.

Respectfully submitted this 4th day of August, 1988.

FORD, NEES & NORDSTROM, P.S.

STEPHEN L. NORDSTROM
Attorney for Appellant

Supreme Court, U.S.
FILED
AUG 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

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APPENDIX "A" THROUGH "D"

118 pp

APPENDIX "A"

FILED
April 12, 1988
Cathy A. Catterson, Clerk
U.S. Court of Appeals

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JACK C. CRAVENS,	
Petitioner/Appellant,	NO. 86-3951
vs.	USDC NO. CV-86-189-JLQ
STATE OF WASHINGTON,	MEMORANDUM*
Respondent/Appellee.	

Appeal from the United States District Court for the Eastern District of Washington
Justin L. Quackenbush
District Judge Presiding

Submitted: March 17, 1988**

Before: NELSON, NOONAN and LEAVY, Circuit Judges.

Jack E. Cravens appeals the denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Cravens contends that the double jeopardy clause bars his reprosecution because the trial judge

erred in declaring a mistrial based on manifest necessity. The judgment is affirmed.

The trial court's declaration of mistrial was based on defense misconduct and thus is entitled to great deference. See Arizona v. Washington, 434 U.S. 497, 511 (1978). Under that deferential standard of review, the record supports the trial court's finding that the defense attorney's reference to polygraphs constituted prejudicial error. Further, the trial judge exercised soujnd discretion in declaring a mistrial because he gave both parties an opportunity to argue the mistrial decision, considered the couble jeopardy consequences of the mistrial decision, and expressly considered the possible alternatives (II ER 63-69, 101-108). See id. at 515-516.

AFFIRMED.

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* The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P.34(a) and Ninth Circuit Rule 34-4.

** This disposition is not appropriate for publication and may not be cited to or by the courts of this Circuit except as provided by Ninth Circuit Rule 36-3.

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
MAY 5, 1988
James H. Larsen, Clerk
ECJ Deputy

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

(MAY 3, 1988)
(MANDATE ISSUED)

JACK E. CRAVENS,	)	
	)	
Petitioner-Appellant,	)	No. 86-3951
	)	
vs.	)	DC No.
	)	Cv86-189-JLQ
STATE OF WASHINGTON,	)	
	)	
Respondent-Appellee.	)	

APPEAL from the United States District Court for the EASTERN District of WASHINGTON (Spokane)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the EASTERN District of WASHINGTON (Spokane) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now

here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is AFFIRMED.

A TRUE COPY
ATTEST May 3, 1988
CATHY A CATTERSON
Clerk of the Court
by: /S/
Juanja Ross
Deputy Clerk

Filed and entered April 12, 1988

APPENDIX "B"

FILED IN THE
U.S. DISTRICT COURT
Eastern District of Washington
May 29, 1986
J. T. Fallquist, Clerk
_____ Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF Washington

JACK E. CRAVENS, Petitioner, vs. STATE OF WASHINGTON, Respondent.	NO. C-86-189-JLQ ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS AND ORDER OF DISMISSAL WITH PREJUDICE

In response to Mr. Cravens' Petition for a Writ of Habeas Corpus, respondent filed a Motion to Dismiss (Ct. Rec. 6). On April 4, 1986, a hearing was held on that motion. Stephen L. Nordstrom represented petitioner and Neil H. Korbas appeared on behalf of respondent. At the conclusion of that hearing the court stayed prosecution of Mr. Cravens and continued the hearing (Ct. Rec. 8). The hearing resumed on April 18, 1986 with

the same counsel representing the parties.

The court's record reflects that petitioner has exhausted his state remedies. After the trial court declared a mistrial and denied Mr. Cravens' motion to dismiss, petitioner sought discretionary review in the Washington Court of Appeals. That motion was denied by the Court Commissioner. Mr. Cravens then filed, in the Court of Appeals, a motion for review of the commissioner's ruling. Judge Green, on behalf of the court, denied that motion. Petitioner appealed to the Washington Supreme Court from both of the adverse decisions. The Court Commissioner for the supreme Court denied that request for discretionary review. Finally, Mr. Cravens sought review of the Commissioner's Ruling. On February 21, 1986, Chief Justice Dolliver ordered that petitioner's Motion to

Modify Commissioner's Ruling be denied. Mr. Cravens then filed the present petition.

Mr. Cravens was charged with second degree theft in Spokane County Superior Court. The state contended Mr. Cravens was paying off a loading dock employee of Ziegler Lumber Company in exchange for the defendant obtaining building materials without paying the lumber company. Apparently, the employee admitted his involvement and implicated Mr. Cravens. In his opening statement, counsel for the defendant denied wrongdoing by Mr. Cravens and informed the jury that the loading dock employee was the thief, not Mr. Cravens. Counsel for the defendant further informed the jury that the case would turn on the credibility of the witnesses. (Ct. Rec. 7, Appendix A, P. 16).

Trial commenced on July 2, 1985. As its first witness, the state called Vern E. Ziegler. Mr. Ziegler was the employer at the business from which the alleged theft occurred. In cross-examining this witness, petitioner's trial counsel inquired: "Mr. Ziegler, in an effort to identify stealing by your employees at Ziegler Lumber, did you have your employees take polygraphs?" (Ct. Rec. 7, Appendix A, p.61, Lines 5-7). The prosecutor immediately objected and the court sustained the objection.

At that point, all counsel approached the bench and the prosecutor moved for a mistrial on the basis that "polygraphs or the fact of the polygraph, or anything even tangently related to polygraphs can[not] come before the jury." (Ct. Rec. 7, Appendix A at p.61, lines 16-18). Defense counsel asserted that he had not introduced the results

and resisted the mistrial. The following exchange between the court and defense counsel then occurred:

> THE COURT: I feel that the interjecting of this subject of lie tests here is very prejudicial, and I think there is no justification for it, even though everyone knows that it occurred. The law is very clear that no one can introduce results of lie tests --
> MR. JANECEK: And I don't intend to --
>
> THE COURT: -- and you interjected it, and that's the problem. You did it deliberately, and to try and explain this through the Prosecutor would even further the elements of prejudice, and the jury would wonder why aren't the results brought out.
>
> I am disposed to grant the mistrial. I think that this was a deliberate endeavor to interject something that is entirely inadmissible.

(Ct. Rec. 7, Appendix A, p.62, lines 12-25).

After excusing the jury, the court heard argument from the attorneys. At this point, defense counsel suggested the

situation could be resolved by admonishing the jury to disregard the questions. In granting the request for a mistrial, however, the court declared:

> Well, if you were on the other side, of course, you would no doubt understand how easily you would be upset at the Prosecutor asking such a question and saying in argument that once the bell has been rung, that's it. You know that, Mr. Schweda [defense counsel], from your work in the Prosecutor's Office; and the bell has been rung here. It was rung deliberately by the injection in this question of the fact of lie tests. There was no need for it . . . The damage has been done There is no way the Prosecutor, the State, can be made in any way whole on the situation by any kind of direction to the jury to disregard. The trial is something in which both sides are entitled to fair treatment, and this is not fair treatment to the State.

(Ct. Rec. 7, Appendix A, p.68, lines 20-25, p.68, lines 1-22).

The next day a hearing was held on defendant's motion to dismiss based upon

double jeopardy grounds.[1] After hearing argument from counsel, the court announced that: "In my judgment, there is a clear showing of manifest necessity and a need to discharge the jury in order to assure that the ends of justice would not otherwise be defeated." (Ct. Rec. 7, Appendix A, p.103, lines 2-4). The court further explained:

> The decision of this court in determining that the error was such that the State could not have a fair trial was prompted not only by the circumstances which I have earlier alluded to, but the fact that any alternative which was suggested here, the sole one being that the jury be instructed to disregard the question, wouldn't have cured the situation, as pointed out by Justice Stevens in the Arizona [v. Washington, 434 U.S. 497

---

1 The trial court may consider the entire record in evaluating the mistrial decision. State v. Freeman, 38 Wn.App. 665, 668, 687 P.2d 858 (1984).

> (1978)] case. That kind of admonishment, after a long hearing at the bench, privately, outside the hearing of the jury, after the objection, wouldn't have satisfied the ends of justice at all. The jury wouldn't have disregarded that, and we know it. It would wonder 'what are we not being told here, aren't we entitled to find out what the results of these tests are?' And, of course, they can't. And the prosecutor can't get that in. And it's the defendant who brought it up. It's the defendant who propounded the questions. And now the defense wants to have the case dismissed because of this sort of activity.

(Ct. Rec. 7, Appendix A, p.105, lines 20-25; p.106, lines 1-10).

Finally, in denying the motion to dismiss, the court explained:

> Considering all of the circumstances in this case, it appears clearly that this problem was brought on by the defendant, through his counsel propounding a question which was obviously known to be improper. It presented a situation where the State was obliged to object to a very critical question in the minds of the jury. And to try and

> apparently as far as the jury was concerned, keep out any reference to polygraph results. And the jury was, therefore, left to speculate what happened here. It presented a situation where the State was placed in an untenable situation.
>
> It was not the result of any governmental misconduct or harassment, in any way, to try to force the defendant through a separate trial -- second trial, in any way. The situation presented was one which was, as declared by the law that I just quoted, one in which there was a manifest necessity or that the ends of public justice would otherwise be defeated unless a mistrial was declared.

(Ct. Rec. 7, Appendix A, p.108, lines 3-19).

The state trial court enunciated the proper standard to be applied to a determination of whether declaration of a mistrial prohibits reprosecution on double jeopardy grounds. The prosecution bears the burden of demonstrating "manifest necessity" for the declaration of a mistrial. Arizona v. Washington, 434 U.S.

497, 505 (1978). The test is sometimes alternatively stated as requiring a showing that "the ends of public justice" would be defeated is a mistrial were not declared. See id. at 506 n.18 (quoting United States v. Parez, 9 Wheat. 579 (1824)). Additionally, the reviewing court must determine whether the trial court exercised "sound discretion" in ordering the mistrial. Arizona, supra, 434 U.S. at 514; United States v. Jarmillo, 745 F.2d 1245 (9th Cir. 1984).

In defining "manifest necessity," the Supreme Court stated that it would require a "high degree' of necessity before deeming a mistrial appropriate. Arizona, 434 U.S. at 506. The Court noted, however, that such a showing would vary according to the circumstances of the case. It stated that greatest scrutiny would be applied to those instances in which a prosecutor requested

a mistrial in order to strengthen the evidence. Id. at 507. On the other hand, "special respect" would be accorded to a trial court's determination that improper comments by defense counsel may have affected the jury's impartiality. Id. at 510-11.

The present action appears to fall into the latter category. The trial judge based his grant of the mistrial upon defense counsel's inquiry into polygraph examinations. The court found that because the state was forced to object to the questions, the jury would be left to speculate as to the answer to the question and might draw prejudicial inferences from the state's objection.

The state court found that the mere asking of the question was prejudicial error based upon the posture of the trial and the impact upon the jury. Results of polygraph examinations clearly are not

admissible under Washington law. State v. Sutherland, 94 Wn.2d 527, 529, 617 P.2d 1010 (1980). The Washington Supreme Court recently reiterated its view, however, that "[t]he fact that a jury is merely apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference to the result is not prejudicial." State v. Terrovona, 105 Wn.2d 632, 652, 716 P.2d 295 (1986). See also State v. Lavaris, 99 Wn.2d 851, 861, 664P.2d 1234 (1983); State v. Sutherland, 94 Wn.2d 527, 530, 617 P.2d 1010 (1980) (en banc); State v. Descoteaux, 94 Wn.2d 31, 38, 614 P.2d 179 (1980).

It is difficult for this court, reviewing a cold transcript, to determine what prejudice may have arisen from the asking of such a general question regarding the administration of polygraph tests or from the state's objection

thereto. The trial court, however, found that the fact that the inquiry had been made, and at the state's insistence not answered, might lead the jury to conclude that the state was attempting to hide something from it. On that basis, the court found that merely admonishing the jury to disregard the question would not alleviate any prejudice to the state.

In analyzing the state court's actions, this court must keep in mind the admonitions of the Supreme Court.

> Where, for reasons deemed compelling by the trial judge who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistent with the Fifth Amendment. Simmons v. United States, 142 U.S. 148; Logan v. United States, 144 U.S. 263; Dreyer v. Illinois, 187 U.S. 71, 85-86. It is also clear that "This Court has long favored the rule of discretion in the trial judge to declare a

> mistrial and to require another panel to try the defendant if the ends of justice will be best served . . .," Brock v. North Carolina, 344 U.S. 424, 427, and that we have consistently declined to scrutinize with sharp surveillance the exercise of that discretion. See Lovata v. New Mexico, 242 U.S. 199, cf. Wade v. Hunter, supra.

Gori v. United States, 367 U.S. 364, 368 (1961). The reasons for this approach were further delineated in Arizona, supra, 434 U.S. at 513-14:

> There are compelling institutional considerations militating in favor of appellate deference to the trial judge's evaluation of the significance of possible juror bias. He has seen and heard the jurors during their voir dire examination. He is the judge most familiar with the evidence and the background of the case on trial. He has listened to the tone of the argument as it was delivered and has observed the apparent reaction of the jurors. In short, he is far more "conversant with the factors relevant to the determination" than any reviewing court can possibly be. See Wade v. Hunter, 336 U.S. 684, 687.

While it appears from reviewing the transcript that merely sustaining the state's objection may have avoided the problem, the trial judge had observed and heard the presentation of the evidence and had the opportunity to evaluate the impact of the objectionable question upon the jury. Although the question, in and of itself and viewed in the abstract, may not have been so prejudicial under state law, the crucial inquiry is whether the question, in combination with the objection and the posture of the trial, caused some prejudice in the minds of the jury. That determination depends upon more than just the wording of the question, rather it encompasses many factors which the trial judge was in the best position to evaluate.

As stated previously, this court must determine whether the trial judge exercised "sound discretion" in reaching

his conclusion. Again, Arizona is instructive:

> Thus, if a trial judge acts irrationally or irresponsibly, cf. United States v. Jorn, supra; see Illinois v. Somerville, 410 U.S., at 469, his action cannot be condoned. But our review of this record indicates that this was not such a case. Defense counsel aired improper and highly prejudicial evidence before the jury, the possible impact of which the trial judge was in the best position to assess. The trial judge did not act precipitately in response to the prosecutor's request for a mistrial. On the contrary, evincing a concern for the possible double jeopardy consequences of an erroneous ruling, he gave both defense counsel and the prosecutor full opportunity to explain their positions on the propriety of a mistrial. We are therefore persuaded by the record that the trial judge acted responsibly and deliberately, and accorded careful consideration to respondent's interest in having the trial concluded in a single proceeding. Since he exercised "sound discretion" in handling the sensitive problem of possible juror bias created by the improper comment of defense counsel, the mistrial order is supported by the "high degree" of necessity which is

> required in a case of this kind. Neither party has a right to have his case decided by a jury which may be tainted by bias; in these circumstances, "the public's interest in fair trials designed to end in just judgments" must prevail over the defendant's "valued right" to have his trial concluded.

Id. at 515-16.

Most of these same actions were taken by the trial judge in the present action. The parties were given an opportunity to argue the appropriateness of declaring a mistrial and the double jeopardy consequences of such a decision. The only alternative suggested, that of instructing the jury to disregard the question, was discussed and rejected by the court as being inadequate to cure the possible prejudice.

This court, at oral argument, indicated it was disposed to grant the relief sought by petitioner. However, after a full review of the record and the appli-

cable authorities, the court concludes that although it is a close question, the trial court's ruling was not arbi- trary or capricious. Arizona, supra, at 515. Accordingly, the trial court did not abuse its discretion in granting a mistrial and refusing to dismiss the charges.

Respondent's motion to dismiss is GRANTED. The petition for habeas corpus relief is DISMISSED WITH PREJUDICE. This court withdraws its stay of prosecution of Mr. Cravens.

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 28th day of May, 1986.

/S/
JUSTIN L. QUACKENBUSH
United States District Court Judge

FILED IN THE
U.S. DISTRICT COURT
Eastern District of Washington
May 29, 1986
J. R. FALLQUIST, Clerk
_____Deputy

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

JACK E. CRAVENS	JUDGMENT IN A CIVIL CASE
v.	
STATE OF WASHINGTON	CASE NUMBER: C-86-189-JLQ

/ / Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

/XX/ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the Respondent's motion to dismiss is granted and the petition for habeas corpus relief is dismissed with prejudice.

May 29, 1986	/S/
Date	Clerk

APPENDIX "C"

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON, Plaintiff, vs. JACK EUGENE CRAVENS, Defendant.	Spokane Co. Cause No. 85-1-00286-6 Bef. Hon. William J. Grant, J. (Sitting with a Jury) July 1 and 2, 1985 Spokane,Washington

PARTIAL VERBATIM REPORT OF PROCEEDINGS

ORIGINAL

DELIVERED: July 30, 1985

By: /S/
Kay Blankenship
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	
Plaintiff,	No. 85-1-00286-6
vs.	Bef. Hon. William J. Grant, Judge
JACK EUGENE CRAVENS,	(Sitting with a 12-person Jury)
Defendant.	July 1, 1985 Spokane,Washington PARTIAL VERBATIM REPORT OF PROCEEDINGS:

AFTERNOON SESSION

APPEARANCES: 2:00 p.m.

MR. NEIL KORBAS
Deputy Prosecuting Attorney
County-City Public Safety Building
Spokane, Washington 99201

MR. PETER S. SCHWEDA and
MR. J. T. JANECEK
Attorneys for Defendant
c/o FORD, NEES & NORDSTROM
S. 323 Pines Road
Spokane, Washington 99206

***** ***** ***** ***** *****

...him." He said, "You got any idea why he just called me and specifically asked for you?" Aster at that point said, "What do you want to know?" And Aster started to tell him how he had been informed that Mr. Cravens would come into Ziegler Building Center, buy a small item for one of the people who was the Sunday manager there; would pay 5, 10, $15 for whatever he had; then go out to the back and be loaded up with whatever he wanted -- 2, 3, 4, 5, $6,000 worth of property and drive off with it.

It is our position that there was a conspiracy between the person who was working for Ziegler -- and you will find out that his name is David Hunter -- and Mr. Cravens, in which Mr. Cravens would come in, deal specifically with Mr. Hunter -- and we don't know for sure, but we will be presenting testimony upon which you can find that there was some

kind of agreement, and there probably was some money that passed between them, although it didn't go to Ziegler.

So upon learning about this, Mr. Ziegler will testify that he contacted the Sheriff²s Department. The Sheriff's Department then contacted Mr. Aster, and Mr. Aster told them exactly the same story.

As a result of that, there was a meeting set up where Mr. Cravens was to come in and pick up some material. They...

...Mr. Cravens come in, buy a small item, go out to the back and pick up a large quantity of material and drive off. In fact, it's either Mr. Way -- I believe it's Mr. Way who will tell you how he got suspicious. So when he would see this -- and he'll tell you why he got suspicious, and I'll let him get into that with you -- that after this happened on at least one occasion and possibly two, he decided to go see what Mr. Cravens bought. So he went up to the front and checked the invoices, and Mr. Cravens had not bought those items that he had hauled off on his truck.

Now, Mr. Cravens is not charged with taking all of these items. He is charged with taking $552-worth of 2 x 6's on Sunday, March 3rd. Now I ask you to look at what that charge is, and I ask you to look at what he is charged with, and use this other information only as background

as to why Mr. Cravens -- and the evidence will come out without any doubt at all -- there won't be any argument -- that he went in, picked up these 2 x 6's and did not pay anyone $552.

So I ask you to look at all of these things that have occurred, look at all of the evidence, evaluate the credibility of all the witnesses, and at the conclusion of this case, I'll be coming back to you again. At that time, I will be asking you, based upon the information that has been...

Q And would you tell the jury, just in general terms, what you discovered?

A We had been watching the gross profits of the Valley operation since the reporting period at the end of the second quarter of 1984, and we were aware of the fact that we had some problem in shrinkage, lost material, by our accounting purposes or principles. Our gross profits were not holding up the samplings, and we were aware of that fact and were concerned with that fact.

Q And after you became aware of this information, what did you do?

A Well, we continued to watch the operation to see if we couldn't put a handle on where the gross profits were slipping, and very frankly, we reviewed and oversaw everything that we could possibly oversee to try to

determine where the holes might be; and in fact before the end of the year we had decided to change managers in that operation, not knowing exactly where the slippages were coming from.

Q Did you change managers?

A Sure, we did.

Q Who was the manager that was in there initially?

A The manager since January of 1984 was a young man by the name of Doug Allen.

Q And is still the manager?

A No, sir, again, we decided to change managers at or close to the 1st of the year of 1985.

Q During that period of time -- the 1st part of 1985 -- did you have an opportunity to discuss the problems you were having with other people?

A Yes, I had an opportunity to discuss the problems with a number of people, certainly from within the company; and I was informed by an individual in --

MR JANECEK: Objection, your Honor, based upon relevancy. I think we discussed this before. We will have a continuing objection to gross profit problems going all the way back to 1984 in this matter.

THE COURT: State your basis for your objection.

MR. JANECEK: The basis for our objection is relevancy and that this

is simply not relevant to the issue of theft. In addition, I know that we're about to get into some hearsay, or at least I anticipate that we're about to get into some hearsay testimony.

THE COURT: Objection is overruled with respect to any question of gross profits. As regards hearsay, I will hear the testimony. So far he hasn't said what anybody told him. Proceed.

MR. KORBAS: Thank you, your Honor. Could I have the reporter read back the last question?

(Reporter reads back last question)

Q (By Mr. Korbas:) So the answer to that question was "Yes"?

A Yes.

Q As a result of those conversations, what did you do?

A As a result of those conversations, I looked more specifically into details of potential material shrinkage.

Q Relative to any particular individual?

A Yes, sir.

Q And who would that individual be?

A Jack Cravens.

Q And how did you do that?

A How did I do it?

Q Yes.

A I went back about three months and personally reviewed every invoice that was written at our Valley operation, and I pulled the invoices that were addressed to Jack Cravens

and/or Cravens and I reviewed those invoices as to the potential opportunity that existed for that individual to be appropriating material that wasn't paid for.

Q And after reviewing these things -- these invoices -- well, maybe this is an appropriate time --

MR. KORBAS: May I approach the witness, your Honor?

THE COURT: Proceed.

Q (By Mr. Korbas:) Mr. Ziegler, I am going to show you now...

...directed to the loading area. The white copy, again, stays at the counter and the pink copy stays at the counter. When the gentleman is loaded, he keeps his receipt, the yellow copy No. 2, and the loader keeps the orange copy, which is a loading copy.

Q And now, you have no control over what happens to the customer's copy?

A No.

Q But what happens to the orange copy?

A We keep that for a period of sometimes two weeks, or maybe a little longer. In fact, some managers keep them for longer periods; other managers only for a couple of weeks, and it's to determine if there is any inequities in the loading if there is a problem that arises. If a customer calls, as example -- "I bought ten 2 x 4's,

but the loader only gave me nine 2 x 4's", we can refer to that copy and see who loaded it and compare it with the receipt that the customer has. It's a -- it is just a copy that is handled by the loader. We do not keep those for any long period of time as a company requirement.

Q I see. Now after you pulled these copies, what's the next thing that you did in furtherance of any investigation that you were conducting?

A Well, after looking at these copies, I determined that there...

...was need to further investigate, and I worked on this, by the way, for two full days. The third day I decided to interview my employees and to see if I could determine their knowledge was of what it is that I had suspected.

Q And specifically, did you interview one of your employees named Rick Aster?

A Yes, sir.

Q And do you know when that was? Do you know when the first time was that you talked to him?

A Yes, sir.

Q When would that have been?

A In the late morning, Wednesday, February 27th.

Q And did you learn anything of any value from Mr. Aster?

A I think so; Mr. Aster confessed to me as having worked with Jack Cravens in the appropriation of

building materials from my company without paying for them.

Q And as a result of that information, what did you do?

A I called the police.

Q And after the police were called, did you talk to anyone in particular?

A I talked to a lot of people; I talked to --

Q Well, okay -- strike that. Did you made your concerns known to the police?

A Sure.

MORNING SESSION

July 2, 1985
9:30

THE COURT: You may bring in the jury.

(JURY IN)

Good morning. We will now resume with the continued cross-examination of Mr. Ziegler. Please call Mr. Ziegler.

(Mr. Ziegler enters court-room)

THE COURT: Mr. Ziegler, please consider yourself still under oath. Please resume the witness chair.

MR. ZIEGLER: Yes, sir.

VERNON ELDON ZIEGLER, having previously been duly sworn, resumed the witness chair and continued testifying as follows:

CROSS EXAMINATION - (Continued)

BY MR. JANECEK:

Q Good morning, Mr. Ziegler.

A Good morning.

Q We had a little trouble communicating yesterday, and I understand that you have a hearing problem, so today I'll attempt to talk a little more slowly --

A Thank you.

Q -- and I appreciate your hearing problem because I'm deaf in one ear' so we'll see if we can struggle through this this morning; okay.

A Okay.

Q And did you -- were you able to identify if you had some shrinkage?

A No.

Q You referred to gross profit. I'd like to ask you to -- my next question is directed at contrasting gross profit versus actual losses --

A Okay. I didn't hear you, sir.

Q Okay. And I appreciate your calling that to my attention. My next question is directed at contrasting the term "gross profits" versus actual losses. Specifically --

A I'm not sure I understand the comparison, but let's continue.

Q We're going to get there. When you refer to "gross profits" being down, you don't actually know if you actually have any theft losses; isn't that true?

A That's true.

Q Okay. Isn't it true that your

earlier testimony was that there was a clear pattern discernable from the invoices that would indicate that Jack Cravens and employee Dave Hunter were probably stealing?

A To me, yes, sir.

Q Okay. Was there anyone else where this discernable pattern was available to you?

A No -- any other customers or any other employees?

Q Any other combination of employees and customers?

A I suspected that there was probably two other employees that were involved.

Q And what were their names?

A Rick Aster, and I also suspected a young man by the name of Steve Anderson.

Q With respect to Steve Anderson, was there a particular client or customer that you though(t) that employee Steve Anderson was involved in stealing in much the same fashion as you discern a pattern between Jack Cravens and Dave Hunter?

A I'm not sure I understand: Was there a pattern with Steve Anderson and Jack Cravens --

Q No, no --

A -- or Steven Anderson and someone else?

Q Steven Anderson and another customer, analogous to the pattern you discerned between Jack Cravens?

A Well, I didn't discern any pattern between Steve Anderson and another customer.

Q So your testimony, then, is that you didn't see a pattern between Steve Anderson and any other employee?

A That's right. You said "employee."

Q Excuse me. Steve Anderson and another customer?

A No

Q I thank you for correcting me. Did you suspect that Steve Anderson was stealing with Jack Cravens?

...Gary Galbraith of stealing?

A Yes, sir, but Mr. Galbraith was not an employee of Ziegler Lumber Company.

Q Where was he employed at?

A Zig's Electric & Plumbing Supply, sir, which is a separate corporation, of which I have no interest.

Q Which, from a physical standpoint, is adjacent?

A That is correct. My company, Ziegler Lumber Company, leases space to Zig's Electric & Plumbing Supply Company to operate a retail plumbing and electrical supply operation. Again, I have no financial interest or control in that company and have not had for over two years, nor does any of my children or wife or other close relatives, although my nephew owns all the stock --you just as

well know that now -- my nephew, David M. Moore, owns 100 percent of the shares of Zig's Electric & Plumbing Supply.

Q Given your lack of financial interest, is there a reason that you asked Gary Galbraith if he was stealing with Jack Cravens?

MR. KORBAS: Objection

A Sir --

THE COURT: State your grounds.

MR. KORBAS: Relevancy, your Honor.

THE COURT: All right. I sustain the objection.

MR. JANECEK: Well, your Honor, I'd like to make an offer of proof. I would ask that counsel be permitted to approach the bench.

MR. ZIEGLER: Your Honor, for what it's worth, I don't have any problem with that question. Maybe counsel does.

THE COURT: (Addressing Counsel:) Approach the bench.

(Whispered conference at the bench, outside the hearing of the jury, reported as follows:)

THE COURT: State your offer and speak to the Court Reporter.

MR. JANECEK: My offer of proof, your Honor, would be the fact that our contention is that Vern Ziegler is obsessed with identifying thieves. In fact, he has gone to the length of giving polygraphs to many employees, even in stores where he said he doesn't have a financial

interest, which is the plumbing store right next door. He throws hot coffee on one of the gentlemen that he accuses of knowing Jack Cravens --

THE COURT: He throws what?

MR. JANECEK: Well, his son threw a cup of coffee --

THE COURT: I can't understand you.

MR. JANECEK: Okay. Back in chambers we discussed that Mr. Korbas was seeking a motion in limine, although we didn't do it in open court, seeking an assault on Gary Galbraith. The assault on Gary Galbriath arose because Vern Ziegler was convinced that he was stealing with Jack Cravens, and in conjunction with his son, they threw hot coffee on him, spit upon him, pushed him around. Our argument is that he is obsessed with identifying a thief and that taints his entire testimony -- his testimony as far as today -- and that's our offer, and I chose to do it up here as opposed to there because not where the jury could hear it --

THE COURT: Say again?

MR. JANECEK: I said that's why I asked to approach the bench so we could address it here.

THE COURT: All right. There may

be hard feelings and strong emotions on the part of Mr. Ziegler and others who may have been suspects, but I think getting into this sort of realm of testimony is going off on a side track and is not relevant. I think that you can sufficiently argue Mr. Ziegler's strong feelings about identifying thieves from the testimony that you are now eliciting without going into why he may have accused someone else such as Mr. Galbraith, and getting into throwing coffee on someone...

and things of that nature is entirely irrelevant to the issues here presented.

I sustain the objection.

(OPEN COURT:)

Q (By Mr. Janecek:) Mr. Ziegler, in an effort to identify stealing by your employees at Ziegler Lumber, did you have your employees take polygraphs?

MR. KORBAS: Objection.

THE COURT: Sustained.

MR. KORBAS: Your Honor, may I approach the bench?

THE COURT: Very well.

(Whispered conference at the bench, outside the hearing of the jury, reported as follows:)

MR. KORBAS: I think I am forced at this time to ask for a mistrial. I don't believe there is any way that polygraphs or the fact of a polygraph, or anything even

tangently related to polygraphs, can come before the jury. I didn't believe that this was going to happen.

I haven't researched it. That is just my general understanding of the law.

(Both defense attorneys start to speak --)

THE COURT: Just a minute. There's only going to be one attorney speaking for the defendant.

MR. JANECEK: If I could slip a little closer.

Your Honor, we haven't briefed this issue, but I recall seeing a case here just a few years ago that they had no problem in a major criminal case with the fact of polygraphs, and again it goes to the issue -- not the result of what the polygraphs were -- but it goes to the issue of (1) his obsession, and (2) he indicates gross profits are down and the polygraphs, not the results themselves, but statements made in connection with the polygraphs, admissions by those who were given polygraphs, would indicate a number of people -- a number of his employees -- virtually all of them -- have confessed to stealing. He's trying to hang all the gross profit loss on Mr. Cravens.

MR. KORBAS: Your Honor, when I come back on redirect, I believe Mr. Ziegler

is going to testify that the gross profits were down somewhere in the neighborhood of $50,000. All of the results of the polygraphs show that employees stole no more than $700. It is totally irrelevant.

This Court has reviewed those polygraph records, and I submit that there is no way that the amount of theft that shows up in those poly- graph results would come anywhere close to being able to be recognized in gross profits.

THE COURT: You say the evidence of any thievery as a result of the lie tests would aggregate no more than how much?

MR. KORBAS: $700; I think that's what Mr. Ziegler told me. I'll check that with him, but that is my recollection of it. He was telling me about how much; that it seems to me he said something about $3 million worth of sales. $700 in loss in $3 million worth of sales. $700 in loss in $3 million worth of sales is a very insignificant amount -- it would never show up anyway --

MR. JANECEK: Your Honor, the problems were gone into by his opening the door and going into gross profits.

MR. KORBAS: I didn't think that was going to happen, Judge.

THE COURT: I feel that the interjection of this subject of lie tests here is very prejudicial, and I think there is no justification for it, even though everyone knows that it occurred. The law is very clear that no one can

introduce results of lie tests --

MR. JANECEK: And I don't intend to --

THE COURT: -- and you interjected it, and that's the problem. You did it deliberately, and to try and explain this through the Prosecutor would even further the elements of prejudice, and the jury would wonder why aren't the results brought out.

I am disposed to grant the mistrial. I think that this was a deliberate endeavor to interject something that is entirely inadmissible.

MR. JANECEK: Your Honor, if we could take a brief recess, we can go get the case law on it.

THE COURT: What does your case law say?

MR. JANECEK: My recollection -- and I didn't think it was going to be a problem, because I wasn't talking about introducing the results of polygraphs -- but I read, I believe a Supreme Court case, within the last few years that had statements made in connection with polygraphs to witnesses posed no problem, and I am not deliberately trying to interject something that was inadmissible. I think it is admissible, and I think it goes to the issue of Vern Ziegler's obsession --

MR. KORBAS: Just for the record, your Honor, I think the issue of obsession of Mr. Ziegler is irrelevant

anyway.

MR. JANECEK: -- and I think it slants his testimony.

THE COURT: Well, I can understand that there may be law with respect to the admissibility of statements that result from inquisitory actions in the way of polygraph examinations, but this deliberate injection of the fact of polygraphs is what is so prejudicial, and we know that the law is that the fact of lie tests and the results of lie tests are just an anathema --

MR. KORBAS: If the reporter could go back to the question that Mr. Janecek asked Mr. Ziegler and I objected, could we have that read back?

MR. SCHWEDA: Your Honor, may I ask, if you're disposed to grant a mistrial, could we ask -- maybe it would be better for everybody to hear, if we could maybe excuse the jury for a few minutes and get this straightened out?

MR. KORBAS: There may be a way to save this, depending upon what the question was, and I don't want a mistrial. I'd just as soon we could salvage what we've got so far.

MR. JANECEK: Salvage from the standpoint --

MR. KORBAS: If your question was: Did you require your employees to take polygraphs, I believe Mr. Ziegler can testify "no," and if we just drop it at that, we may be able to salvage it. If

the question was: Did you administer polygraphs, then Mr. Ziegler is going to have to answer "yes," and we can explain it away as a fishing expedition by counsel as to the issue of polygraphs, depending upon how it came out. I don't want it injected into this case to the point where we're going to have to retry it again.. If we're going to retry it, we ought to do it from now.

If anybody can come up with a way to salvage this thing, I am willing to listen.

THE COURT: All right, I will excuse the jury. We will take this up in a little more detail.

(OPEN COURT:)

THE COURT: Members of the jury, on a question of law, I must take up with the attorneys a little bit more in detail the subject of evidentiary matters which has to do with the continuation of the trial, and I want to do it in the absence of the jury. So I'll excuse you. Please keep in mind the admonitions earlier given you with respect to this case.

The jury will stand in recess for a few minutes. The jury is now excused.

(JURY FILES OUT)

(Court reporter reads back last question by Mr. Janecek of Mr. Vern Ziegler:)

THE COURT: Well that's the question, Mr. Korbas. The objection was sustained.

MR. KORBAS: Well, based upon that, your Honor, I think I'm in the position where I have to ask for a mistrial. I don't believe that the issue of polygraphs -- the running of a polygraph -- can be admitted into evidence in this case. I believe that just the fact of the question,...

...irrespective of the answer, has prejudiced the jury so badly that they're going to be wondering what the results of this polygraph are, and the State's position is that we can't get into it' and for that reason I would ask that the Court declare a mistrial, although I am willing to listen to any other suggestions that counsel has as to a way of curing this.

THE COURT: For the defendant?

MR. JANECEK: Your Honor, again, one of my bases for that was the influence, I believe, that Mr. Ziegler's need to identify who has been stealing has influenced him to the extent that he has gone. As far as salvaging it, I believe that it is permissible when you get to the issue of motive for the polygraph to come in. I wasn't attempting to ambush Mr. Korbas, and I believe that we had talked about the polygraphs back there

and the issue never strenously came up. I didn't feel that Mr. Korbas had an objection as long as we didn't talk about the results and I indicated that I was interested in statements, and that was when we were battling to get access to the statements of the polygraphs. I've reviewed those polygraphs, and there is a number of statements in there were employees are indicating that they have stolen from Zieglers, and they know other employees that have stolen from Zieglers.

Against the background of that, against the background of testimony that gross profits are down and the suggestion that Mr. Cravens was responsible for it, if the Court is inclined to believe that it is impermissible, perhaps the only way to salvage would be follow-up questions highlighting the fact that polygraphs are inadmissible -- the results of polygraphs are inadmissible -- and that a question designed to elicit whether those employees as a result of -- excuse me -- as a result of those tests, that employees admitted to stealing -- a number of those employees admitted to stealing -- and that's about the only way I can see to salvage it. So I haven't given a lot of thought to salvaging, because I didn't think it was inappropriate.

MR. SCHWEDA: Your Honor, may I add just one -- I know you don't -- The

question wasn't answered, as far as I know, and I don't see why this can't be solved by just having the jury admonished to disregard that last question.

THE COURT: Well, if you were on the other side, of course, you would no doubt understand how easily you would be upset at the Prosecutor asking such a question and saying in argument that once the bell has been rung, that's it. You know that, Mr. Schweda, from your work in...

...the Prosecutor's Office; and the bell has been rung here. It was rung deliberately by the injection in this question of the fact of lie tests. There was no need for it.

There could have been a question submitted to Mr. Ziegler: Did you undertake an investigation, and as a result of that investigation, did you believe that other people employed by you had stolen? You could have brought it out that way, without introducing this business of lie tests. Your pre-trial efforts to obtain the lie test results were obviously for the purpose -- and the Court permitted it, for just one purpose -- and that is to determine whether or not there may have been some collaboration on the part of employees to steal and that sort of thing that might be exculpatory to

Mr. Cravens; but this business of inquiring as to the fact of lie tests is entirely unjustified. It can't be explained now. The damage has been done. There is no way the Prosecutor, the State, can be made in any way whole on the situation by any kind of direction to the jury to disregard. The trial is something in which both sides are entitled to fair treatment, and this is not fair treatment to the State.

The court will declare a mistrial.

Will you ask Mrs. Shahan, if she is in charge of the...

...continue with some other jury panel, and I don't like to have any kind of mention made of what you may have learned about it to anyone else, for obvious reasons.

So if you will please keep those requests in mind and abide by them, you are now excused entirely from further service in this particular case, and I express the thanks of all concerned for your taking the time to come and sit and be selected and participate to the extent that you have. You have been very cooperative and patient. We all appreciate that.

So with these remarks, the jury is now excused and the jury is discharged from further service in this case. If you will call in this evening after 5:00 o'clock. The jury is excused. Court will be in recess.

(Whereupon, Court recessed

until 2:40 p.m., July 2, 1985)

AFTERNOON SESSION

July 2, 1985
2:40 p.m.

THE COURT: Good afternoon.

MR. SCHWEDA: Good afternoon, your Honor.

THE COURT: Proceed.

MR. KORBAS: Thank you, your Honor. I believe it would be appropriate at this time to reset this matter...

...for trial. I am anticipating defense objection to that. The Court has declared a mistrial in this case. The jury has been excused, and under 3.5 of the Criminal Rules, this matter has to be reset for trial within 90 days if the defendant is not in custody, within 90 days of this Court's Oral Motion.

The defense is present, along with the defendant, Mr. Cravens. I would like to get this matter going as soon as possible. If it's at all possible, I would like to start in trial tomorrow, and the reason I say that is as the Court is well aware, the last time this matter was brought on for trial, we brought a witness in from Illinois at a cost of approximately $750. That witness is here again at another cost. I think this will be cheaper, because through some promotional thing that the airline was having, I believe that we may be getting

a rebate on at least a portion of his ticket; but as long as he's here, I think it would be appropriate to proceed to trial with all haste so that we don't have to bring him back again.

THE COURT: For the defendant?

MR. SCHWEDA: Thank you, your Honor. First of all, your Honor, to proceed in a logical order: The first thing we would do is make a motion to...

...dismiss the case. I would like to cite some authority. I think as far as authority for granting a mistrial, the landmark case in this area is Arizona v. Washington, which is found at 434, U.S. 497, at 54 Law. Ed. 2d, 717, or 98 Sup. Ct. 824, and it's a very comprehensive case with a lot of dicta setting up talking about different areas where a mistrial should be granted on the basis of from everything from a hung jury on down, and in this case, particularly what happened was there was a first trial where the Prosecution hid some evidence from the defendant and it was overturned on appeal. Then at the second trial during opening argument, the defense counsel -- first the Prosecutor in his opening made references to prior testimony of witnesses. When the defense attorney had his opportunity, he got up and made references to that the State had

hidden evidence from the defendant. The Prosecutor in that case made a motion for a mistrial. At that time both the Prosecution and defense counsel were given a full opportunity to argue it. The Court reserved ruling and heard two witnesses that day. The next morning the Court was -- again gave counsel -- as I recall, gave counsel again another full opportunity to argue the merits of the mistrial motion. The motion was finally granted.

On appeal to the United States Supreme Court, they affirmed. They held that it was not double jeopardy in...

...this case, because of the extensive argument and so forth, but this case, your Honor, I mainly mention this case because it sets out the guidelines for when a mistrial is appropriate.

As far as in our case, I would like to point the Court to State -- we've done this research over the noon hour, since the Court orally granted the mistrial -- State v. Lavaris, which is at 99 Wn.2d, 851; t page 860 the Court states this, citing State vs. Descoteaux, and then the cite: "Petitioner implies that any reference to a polygraph test is presumed prejudicial unless proved otherwise by the State." See also State v. Sutherland, a cite. "Although is Descoteaux we found that an inference regarding the defendant's scheduled polygraph test was error, the error was not prejudicial," and then they quote Descoteaux. "The mere fact a jury is

apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised." And that's exactly what happened in this case. So if the first threshold question is whether Mr. Janecek's reference to a polygraph test was prejudicial error, and in this case the question was -- and I just paraphrased the first part: In an effort to identify thefts, then quote, "did you have your employees take polygraphs"? So no reference is...

...made to the result of the polygraph, and in fact the question is never answered.

The record should show an objection, and then that objection being sustained. Immediately thereafter, counsel approached the bench, at which time Mr. Korbas asked for a mistrial, and then the colloquy between counsel and the Court continued until eventually the Court did grant the Motion for a Mistrial.

So the issue is this: Under Arizona v. Washington, it talks about the state is entitled to have a fair trial and the defendant is entitled to have a fair trial. Then it talks about different sactions that are possible, such as admonishing the jury and instructing the jury if there is error. It talks about giving due deference to the trial judge's decision and to his exercise of discretion; but at this point, your

Honor, I would beg the Court that in view of this authority in Washington that says asking about a polygraph test, if the question or the answer does not imply the results of the polygraph examination, that that is not prejudicial. So from there we go to the step that if that is the basis -- if a nonprejudicial question is the basis of a mistrial, then necessarily the motion for mistrial is in error and the jeopardy clause of the United States Constitution would...

...foreclose any further prosecution of the defendant.

Now if the Court's inclined to not grant this motion, we would like to address the Court further about the scheduling of a new trial.

THE COURT: Any response?

MR. KORBAS: I can respond now, your Honor. I'd prefer a little time to research this. I was not anticipating a Motion to Dismiss at this time. I have read portions of Arizona v. Washington. I've also done a little bit of cursory research into some other cases. If I'm forced to, I can respond right now, but I really don't feel very comfortable with it. I'm not familiar with the case that Mr. Schweda has cited. I'd like to have an opportunity to read that. I'd like to have an opportunity to read Sutherland and correlate those with some of the other cases that I have had an

opportunity to look at.

MR. SCHWEDA: Your Honor, we do have -- I do have, you know, to be fair, I do have some other citations of authority, and if the Court is inclined to carry this for disposition or further argument, I would be glad to share my authority with Mr. Korbas and also let the Court know what we have done up to this point.

THE COURT: Well, I think in fairness to the State, that Mr. Korbas should be entitled to have an...

...opportunity to respond.

The motion here apparently is to simply dismiss with prejudice on the basis of a finding of double jeopardy, and it goes right to the heart of the question.

So I think it should be argued fully without any kind of pressure to simply respond on the spur of the moment, so to speak.

(PAUSE)

How much time do you need, Mr. Korbas?

MR. KORBAS: Enough time to go down and look at Arizona v. Washington, State v. Sutherland, and State v. Lavaris.

THE COURT: Want to do it this afternoon?

MR. KORBAS: I can, your Honor.

THE COURT: Would it be convenient for you men to stand by if he is able to do this today?

MR. SCHWEDA: Certainly, your Honor, that's fine with me. That would be fine with us, your Honor.

THE COURT: All right, we will stand by and take a recess and give you an opportunity to do that, Mr. Korbas.

Court will be in recess.

(Whereupon, Court recessed on July 2, 1985)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	
	)	Cause No.
vs.	)	85-1-00286-6
	)	
JACK E. CRAVENS,	)	
	)	
Defendant.	)	

ARGUMENT ON MOTION TO DISMISS

BEFORE: The Honorable William J. Grant

DATE: July 3, 1985

APPEARANCES:

FOR THE PLAINTIFF:
NEIL KORBAS
Deputy Prosecuting Attorney
Public Safety Building
Spokane, Washington 99260

FOR THE DEFENDANT:
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Spokane, Washington 99212

FORD, NEES & NORDSTROM
By: J. T. JANECEK
Attorney at Law
South 323 Pines
Spokane, Washington 99206

...the actions of the prosecutor. I would submit that the action that we are protected from here is the action of asking for a mistrial. Certainly nobody can quarrel that the defendant has a valued right to have his trial concluded by a particular tribunal. And this action was -- this right was frustrated by Mr. Korbas' action in moving this Court for a mistrial. I would submit that jeopardy has attached.

He goes on to say about U.S. v. Perez and Arizona v. Washington, that it's a war situation. Manifest necessity or ends of justice would be served. I would inquire then, why this long discussion in Arizona v. Washington under exactly what manifest necessity means. Necessity is not only a necessity, it's a high degree of manifest. The prosecutor has a heavy burden in showing manifest necessity. I would submit that the

threshold question here that the State has been prejudiced, has not been demonstrated. Certainly not under a manifest necessity. I would submit that it has not been shown under any degree or burden of proof, that there is any necessity for a mistrial under the way the case progressed.

Thank you , Your Honor.

THE COURT: In looking at the situation which had developed during the trial here, up to the point of the propounding of this question to witness Ziegler, the background shows that during opening statement for the defendant, counsel remarked that the jury would find that there was a thief here...

... -- thieves, really, not Mr. Cravens, but Mr. Aster, apparently, and Mr. Hunter, employees who would be shown to the jury who had been stealing from Ziegler Lumber. So the defendant has alerted the jury to this other issue, right form the outset, as to whether or not this defendant is the one at fault and criminally responsible, or these others in the employ of Ziegler Lumber Supply.

Then the questioning of Mr. Ziegler is developed and counsel then propounds this categorical question to him, as to whether or not, in his effort to identify stealing by your employees at Ziegler Lumber, did you have your employees take polygraphs?

That was the backdrop of not only this actual setting, but with the knowledge that presumably counsel has of the decisions of our appellate and

supreme courts frowning on the reference, in trial, to the fact of a polygraph test and categorically stating that the results are inadmissible. We have case, after case, after case saying as much. And here, counsel deliberately then, talks about polygraph tests, forcing the State to object. I think it was calculated, as I indicated earlier. It was clearly intended to get before the jury matters which were improper. The State was forced to object. It had no alternative. And then it was obliged to refrain from, in any way, trying to explain it, namely to explain this hiatus that was developing in the minds of the jury with respect to...

...Sullivan, the Florida case:

> The mere fact a jury is apprised of a lie detector test is not necessarily prejudicial if no inference as to the result is raised or if an inference is raised as to the result, it is not prejudicial. (Citing authorities.) However, such evidence is liable to being prejudicial and should be admitted only when clearly relevant and unmistakably nonprejudicial.

The Sutherland case, again in 94 Wn.2d, 527, found once again that the simple reference to the subject of a witness having taken a polygraph test referred to the obvious inference that was raised and stated at 531:

> In the instant case the prime suspect became the State's star witness after taking the polygraph examinations. The jury could scarcely conclude other than that Gerdy was telling the truth and that the police investigator believed him. Thus the meaning of the polygraph test was manifestly prejudicial.

So the Supreme Court has found on this, right from the beginning and on

through the recent cases of State v. Rupe, in 101 Wn. 2d, 664; the appellate court case of State v. Ellison in 36 Wn. App. 564.

The decision of this court in determining that the error was such that the State could not have a fair trial was prompted no only by the circumstances which I have earlier alluded to, but the fact that any alternative which was suggested here, the sole one being that the jury be instructed to disregard the questions, wouldn't have cured the situation...

...as pointed out by Justice Stevens in the Arizona case. That kind of admonishment, after a long hearing at the bench, privately, outside the hearing of the jury, after the objection, wouldn't have satisfied the ends of justice at all. The jury wouldn't have disregarded that, and we know it. It would wonder "what are we not being told here, aren't we entitled to find out what the results of these tests are?" And, of course, they can't. And the prosecutor can't get that in. And it's the defendant who brought it up. It's the defendant who propounded the question. And now the defense wants to have the case dismissed because of this sort of activity.

In the Bishop case, the background had been that a witness named Gregory had ostensibly been threatened by the prosecutor. But the trial court found that wasn't the fact. Nevertheless in

the cross-examination of this witness, defense counsel asked if there hadn't been some warning by the state that he might be charged if he testified at the trial. The state had to object. The objection was sustained, the jury instructed to disregard, and the defendant Bishop then interjected "disregard the truth." And then after hearing from counsel, the court declared a mistrial. This was after it allowed the state an opportunity to move for a mistrial and the state didn't. The court did so on its own motion, and the defendant then moved for a dismissal, arguing that he had a right to be tried by a jury selected and sworn to try the case...

> ...may be declared without the defendant's consent and over his objection and he may be retried consistently with the Fifth Amendment.

Considering all of the circumstances in this case, it appears clearly that this problem was brought on by the defendant, through his counsel propounding a question which was obviously known to be improper. It presented a situation where the State was obliged to object to a very critical question in the minds of the jury. And to try and apparently as far as the jury was concerned, keep out any reference to polygraph results. And the jury was, therefore, left to speculate what happened here. It presented a situation where the State was placed in an untenable situation. It was not the result of any governmental misconduct or harassment, in any way, to try to force the defendant through a separate trial --

second trial, in any way. The situation presented was one which was, as declared by the law that I just quoted, one in which there was a manifest necessity or that the ends of public justice would otherwise be defeated unless a mistrial was declared.

For these reasons, the motion to dismiss will be denied.

(End of transcript.)

APPENDIX "D"

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
NOV 25 1986
JAMES R. LARSEN, CLERK
_____Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

JACK E. CRAVENS,	)	
	)	
Petitioner,	)	Case No.
	)	C-86-189-JLQ
vs.	)	April 18, 1986
	)	3:00 o'clock, PM
STATE OF WASHINGTON,	)	
	)	
Respondent.	)	

TRANSCRIPT OF PROCEEDINGS
PETITION FOR WRIT OF HABEAS CORPUS

BEFORE THE HONORABLE
JUSTIN L. QUACKENBUSH, Judge.

APPEARANCES:

ON BEHALF OF PETITIONER:

FORD, NEES & NORDSTROM, P.S.
By: Stephen L. Nordstrom
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Spokane, Washington 99206

ON BEHALF OF THE RESPONDENT:

NEIL KORBAS
Deputy Pros. Attorney
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County-City Pub. Safety Bldg.
Spokane, Washington 99201

THE COURT: All right.

Mr. Korbas, just one or two questions. You were the trial counsel for the state in this case, were you?

MR. KORBAS: I was, Your Honor.

THE COURT: All right, and I don't see anything in the transcript where you on behalf of the government, on behalf of the state, discussed with the court prior to the actual granting of the mistrial alternatives such as instructing the jury to disregard.

The thing that concerns me in this case the question was asked, which didn't suggest any answer at all, the question was were polygraphs admitted to employees. The question was never responded to, and so I have a concern as to what possible prejudice or jury bias resulted just from that questions.

Secondly, I'd like you to point out to me if there is anything in the

transcript, and I've read the transcript, maybe I'm missing it, of any discussion by Judge Grant of what prejudice or bias asking this question created, what prejudice or bias against the state did the question create in the minds of jurors or could it have created.

MR. KORBAS: To respond first of all, Your Honor, I simply disagree with Mr. Nordstrom's assessment of the law in the State of Washington.

THE COURT: Maybe you could just respond to my...

...question.

MR. KORBAS: Okay. The question that was posited by Mr. Janecek was to the effect that Mr. Ziegler had run all of his employees on polygraph.

THE COURT: No, he asked.

MR. KORBAS: Isn't it true that you --

THE COURT: Well, let's get that specific question.

MR. KORBAS: That was one of my concerns, Your Honor, at the time the matter came up, and I think --

THE COURT: Let's get the question correct, because the transcript does not read the way you quoted it.

At Page 61, the question by Mr. Janecek was, "Mr. Ziegler, in an effort to identify stealing by your employees at Ziegler Lumber, did you have your employees take polygraphs?" That was the question.

4 (Orig. P. 18)

MR. KORBAS: Yes, and at that point I objected because my understanding of basic Washington law was that the fact of polygraph or the mere mention of polygraph was error. Some of the recent cases that had just come out, including Lavaris and Descoteaux, had indicated that the reference to the fact that someone had take a polygraph was in fact error. That was my reading of it. I had gone back --

THE COURT: But what possible bias or prejudice could be created against the state by that question?

MR. KORBAS: The fact that polygraphs were run --

THE COURT: No, but that was not what was before the jury. That's what concerns me. The question was, "Did you?"

MR. KORBAS: And the question could not be answered.

THE COURT: It wasn't answered, but and so -- there is where it was at.

MR. KORBAS: The only way to keep the question from being answered was for the state to object.

THE COURT: Oh, I don't think that's improper at all. I think you did the right thing. But my question, Mr. Korbas, and I'll rephrase it, maybe I didn't make it clear, what possible prejudice or bias against the state was created by that asking of the question without any response?

MR. KORBAS: Because as Judge Grant

found, and I don't have the specific cite to it, if the court would give me a moment I'll find it, the judge indicated that the state was placed in a position where we were forced to object and it appeared that the state was trying to hid the facts of the polygraphs, coupled with the opening statement by the defendant.

THE COURT: Where is that finding by Judge Grant that that would lead anyone to conclude that the state was attempting to hide the results of the polygraph?

...were run or the results from those polygraphs to the jury.

THE COURT: Yes, but the question was not responded to.

MR. KORBAS: It was not, and in fact in the Report of Proceedings the court --

THE COURT: Is there any consideration in the record before the judge granted the mistrial? Is there any discussion about any possible bias or prejudice to the state?

MR. KORBAS: Yes, there is, Your Honor. I speak rather quickly, but I'm sure that there is. But there was a long discussion at the bench. The transcript will reveal that I didn't move for a mistrial and demand a mistrial. I asked for some way to cure the situation. In fact, we went back and reread the question because I thought that if the question could be answered in the negative in some way, shape, or form, then that

would put it to rest and we could just move on. The way the question was asked that could not be done. Mr. Ziegler either had to lie under oath as to whether or not the polygraphs were run --

THE COURT: Why wouldn't just instructing the jury to disregard the question have cured the whole thing?

MR. KORBAS: Because, as Judge Grant found, the bell had already been rung, and I bring this to the court's attention. It's interesting that you can find cases that have the language that say if you disregard what the case was all...

...that he was disposed to grant a mistrial, the defense interjected that they wanted them to make the decision on whether or not he was going to admit the evidence that was seeking to be suppressed or whether he was going to suppress it. His response was, "I don't think that's necessary; the critical question before me is something more akin to whether or not I should grant a mistrial," to which the court that overturned his decision writes that the question to suppress became extremely important. "The court's disagreement with the conclusion we cannot accept, rather this seems the nub of the question. If the jurors were to know that the court on the motion of the defendant had excluded the contents of the case, to tell them to forget it would seem like the classic example of telling the child to sit in the corner and not

think about elephants," and that's just another way of saying what Judge Grant said, and that is once the bell has been rung, you can't admonish the jury to disregard it.

THE COURT: My question, Mr. Korbas, is what bell was rung?

MR. KORBAS: The fact that polygraphs may have been involved in the case, and that the state was trying to hide the results of those polygraphs.

THE COURT: Well, I have difficulty with -- I don't find that in Judge Grant's conclusions. I sense that his ruling, the granting of the mistrial, and I think the cold...

...transcript even confirms that he was a little bit hot under the collar, because the question was asked, as you confirm and you were there, that his biggest concern was that defense attorney, Mr. Janecek, even asked the question. But the question was or didn't lead anyone to conclude whether or not polygraphs were given; the question was were they given.

MR. KORBAS: Your Honor, I don't know --

THE COURT: And I'm having difficulty seeing how that prejudiced the state.

MR. KORBAS: I hate to say this, Judge, but I think you had to be there, and I guess that's perhaps why all of these cases are written the way they are, and that's why the trial judge is given the option of declaring a mistrial.

THE COURT: Well, often times cases

have to be decided on the record; they always are on appeal, and I'm giving this such close scrutiny in view of the heavy burden put upon government, or in this case the state, by the Supreme Court in Arizona v. Washington case.

MR. KORBAS: I think, Judge, that one of the quote that came out of I believe it's Arizona v. Washington is that the trial judge was there. He had an opportunity to see the jury. I didn't see them. From my perspective in the courtroom, I don't know what they did.

THE COURT: Well, Judge Grant hasn't put anything in the record that the jury did anything.

...given deference on appeal. I think that's the clear reading of Washington, and I think that's what all the other cases say, Pierce particularly. Samaha says when the judge identifies possible jury bias, then you give his decision great deference.

THE COURT: But is a judge just able to say I think there is a jury bias without any factual statement supporting that conclusion?

MR. KORBAS: I believe that there is evidence in the record that Judge Grant found that.

THE COURT: And that being his statements that there may be a question in the minds of the jury about what the results were?

MR. KORBAS: Yes, and the fact that he stated, and I think correctly so, that the mention of the word "polygraph" or reference or the results of polygraph in

the State of Washington are anathema.

THE COURT: Well, I don't think the mere mention of the word "polygraph", and that's all there was in this case, is a basis for a mistrial.

MR. KORBAS: One of the cases in Washington, and I'm sorry' I think it's Lavaris, was overturned because of the mention of the word "polygraph".

THE COURT: I would find that had to believe that the mere mention of the word is the basis for a mistrial...